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No. 06-263

In the Supreme Court of the United States

RACHEL HAAS, CAROL HAAS, AND RICHARD HAAS,
PETITIONERS

v.

QUEST RECOVERY SERVICES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS INTERVENOR

PAUL D. CLEMENT
Solicitor General
Counsel of Record
WAN J. KIM
Assistant Attorney General
JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The United States is seeking to intervene in this litigation, pursuant to 28 U.S.C. 2403(a), for the limited purpose of defending the constitutionality of an important federal civil rights law. This brief accordingly addresses only the first question presented by the petition:

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, as applied to correctional programs and services.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is not published in the *Federal Reporter*, but is *reprinted in* 174 Fed. Appx. 265. The opinion of the district court (Pet. App. 14c-30c) is reported at 338 F. Supp. 2d 797.

JURISDICTION

The court of appeals entered its judgment on March 27, 2006. The petition for a writ of certiorari was filed on June 23, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

* The United States has separately filed together with this brief a motion to intervene as of right in this case, pursuant to this Court's Rule 21 and 28 U.S.C. 2403(a).

STATEMENT

1. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that, "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, Congress found that persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). Congress concluded that persons with disabilities

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that

> are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" to enact the ADA. 42 U.S.C. 12101(b)(4).

The ADA targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

This case arises under Title II of the ADA, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B). Title II may be enforced through private suits, 42 U.S.C. 12133, and Congress expressly abrogated the States' Eleventh Amendment immunity to suit in federal court, 42 U.S.C. 12202.

In enacting Title II, Congress instructed the Attorney General to issue regulations to implement Title II, based on regulations previously promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. III 2003). See 42 U.S.C. 12134. Title II

prohibits governments from, among other things, denying a benefit to a qualified individual with a disability because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits provided to the public at large. See 28 C.F.R. 35.130(b)(1)(i), (iii) and (vii). In addition, a public entity must make reasonable modifications in its policies, practices, or procedures if necessary to avoid the exclusion of individuals with disabilities, unless the accommodation would impose an undue financial or administrative burden on the government, or would fundamentally alter the nature of the service. See 28 C.F.R. 35.130(b)(7). The ADA does not normally require a public entity to make its existing physical facilities accessible. 28 C.F.R. 35.150(a)(1). Public entities need only ensure that "each service, program, or activity, * * * when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a). However, building construction or alterations undertaken after Title II's effective date must be designed to provide accessibility. 28 C.F.R. 35.151.

2. Petitioners are an individual with a disability and her parents. In 2002, petitioner Rachel Haas was struck by a truck while operating an all-terrain vehicle. Pet. App. 2a. She suffered severe injuries, including partial amputation of her left leg, receipt of a prosthetic right elbow, and implantation of a metal rod in one arm. *Ibid.* As a result of those injuries, she requires the use of a wheelchair for mobility. *Id.* at 3a. Haas subsequently pleaded guilty to operating the all-terrain vehicle while intoxicated. The municipal court sentenced Haas, *inter alia*, to complete two six-day driver intervention programs conducted by respondent Quest Recovery Ser-

vices, Inc. (Quest). Quest leased its premises from the State of Ohio. *Id.* at 2a-3a.

According to the complaint, Quest's facilities were not wheel-chair accessible and Quest staff refused to accommodate Haas's needs. Pet. App. 3a-4a. Upon arrival, she alleges that she was required to crawl with her luggage up to the sixth floor of the building because the building had no elevator and Quest staff refused to provide assistance. She also alleges that she was required to "hop, scoot, and crawl up and down the steps without any assistance" to receive meals, which were provided in the building's basement. *Id.* at 3a. On one occasion, Haas further alleges, she fell down three flights of stairs and displaced the metal rod in her arm. *Id.* at 4a. After that, Quest agreed to provide meals to Haas in her room, but then allegedly "'forgot' to deliver food on several occasions." *Ibid.* Haas also alleges that Quest's bathroom and shower facilities were inaccessible. *Id.* at 3a-4a. Finally, Haas alleges that, although her counselor gave her a favorable review, Quest's director refused to certify that she had completed the program because "her attitude had been unacceptable." *Id.* at 4a. As a result, Haas was incarcerated for six days. *Ibid.*

3. Haas and her parents filed suit against Quest and the State of Ohio, alleging violations of Title II of the ADA, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. III 2003), the United States Constitution, and state law. Pet. App. 4a, 37d-44d. Ohio filed a motion to dismiss, asserting both that it was immune from suit and that plaintiffs failed to state a claim against the State. *Id.* at 4a. The district court granted the State's motion in part, holding that the Haases had failed to state a claim against Ohio and that Congress did not validly abrogate the State's Eleventh Amend-

ment immunity for Title II claims. The court separately held that the State had waived its immunity for claims arising under the Rehabilitation Act. *Id* at 4a-5a, 14c-30c. The district court subsequently entered an order of settlement, resolving all of petitioners' claims against Quest and all of its claims against Ohio except those arising under Title II. *Id.* at 5a.

4. The court of appeals affirmed. Pet. App. 1a-12a. The court first held that petitioners had failed to state a claim against Ohio under Title II of the ADA because, under circuit precedent, petitioners "did not sufficiently plead that the State of Ohio is responsible for Quest's alleged wrongdoing." *Id.* at 9a.

The court next held that Congress lacked the power to abrogate the States' Eleventh Amendment immunity for claims under Title II. Pet. App. 9a-12a. In so holding, the court of appeals noted this Court's decision in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), which had upheld the constitutionality of Title II's abrogation in the context of access-to-the-court claims. The court reasoned that, because petitioners did not assert an access-to-the-courts claim, *Lane* "does not provide us with guidance." Pet. App. 10a. The court then relied on its pre-*Lane* precedent, *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (en banc), cert. denied, 537 U.S. 812 (2002), which held that Title II's abrogation was valid only for claims "sounding in due process," and was unconstitutional as applied to claims "based upon the Equal Protection Clause." Pet. App. 11a (citing *Popovich*, 276 F.3d at 812). Because petitioners' claims "implicate equal protection concerns," the Sixth Circuit held that the Eleventh Amendment barred their suit. *Ibid.*

5. At no point in the litigation did the parties or the courts below notify the Attorney General that the constitutionality of federal law had been called into question in the litigation. See Fed. R. App. P. 44(a); 28 U.S.C. 2403(a). The United States learned of this case after the petition for a writ of certiorari was filed and has now filed a motion to intervene as of right in this litigation to defend the constitutionality of federal law. See note *, *supra*.

ARGUMENT

The court of appeals has held an Act of Congress to be unconstitutional and, in so doing, has largely ignored and significantly departed from controlling precedent of this Court. Accordingly, the petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for further consideration in light of *United States* v. *Georgia*, 126 S. Ct. 877 (2006), and *Tennessee* v. *Lane*, 541 U.S. 509 (2004).

1. Earlier this year, but before the decision below issued, this Court unanimously held that Title II's abrogation of Eleventh Amendment immunity is constitutional to the extent that an action seeks damages for "conduct that actually violates the Fourteenth Amendment." *Georgia*, 126 S. Ct. at 882 (emphasis omitted). That decision arose, moreover, in the context of claims like petitioners' concerning inaccessible correctional facilities and damages for injuries suffered as a result of such inaccessibility. Compare *Georgia*, 126 S. Ct. at 879 (alleging inaccessible bathroom facilities and correctional programs), with Pet. App. 3a-4a (same).

Furthermore, in *Georgia*, the Court prescribed a three-step framework for addressing Eleventh Amendment claims in Title II cases. Courts must

> determine in the first instance, on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.

126 S. Ct. at 882.

Although *Georgia* was decided two months before the court of appeals' decision in this case and involved a similar challenge to the operation of correctional facilities and programs, the court of appeals did not discuss or cite the case in its decision. Nor do petitioners discuss the case in their petition for a writ of certiorari. Had the court properly applied this Court's holding in *Georgia*, the court would have had no occasion to address the constitutionality of Title II's abrogation of Eleventh Amendment immunity. That is because the court of appeals first held that petitioners failed to state a claim under Title II. See Pet. App. 6a-9a (holding that petitioners did not properly plead a Title II claim against the State). Having so held, there was no reason for the court, under the three-step framework established by *Georgia*, to address the question of whether, had a claim been properly stated, Ohio would nevertheless retain its Eleventh Amendment immunity from suit.

Even if the court of appeals erred in holding that the complaint failed to state a claim against Ohio (see Pet. 14-17), the court of appeals' analysis also omitted the second step of the *Georgia* inquiry. The court did not address whether any of petitioners' claims seek relief "against the State[] for conduct that *actually* violates

the Fourteenth Amendment," 126 S. Ct. at 882, even though *Georgia* held that Title II's abrogation is constitutional in those circumstances. See *ibid.* (making that inquiry a prerequisite to addressing the constitutionality of Congress's abrogation for non-constitutional violations).

By addressing the constitutionality of an Act of Congress in advance of the necessity of doing so, the court not only failed to hew to *Georgia*'s framework, but also ignored the "'deeply rooted' commitment" and obligation of federal courts "'not to pass on questions of constitutionality' unless adjudication of the constitutional issue is necessary." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004) (quoting *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944)). That principle of constitutional avoidance is at its apex when courts address the constitutionality of an Act of Congress and thereby undertake "the gravest and most delicate duty" that courts are "called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (internal quotation marks omitted).

As *Georgia* teaches, that principle of constitutional avoidance applies with full force to Eleventh Amendment immunity claims. *Georgia*, 126 S. Ct. at 882; see *Lane*, 541 U.S. at 530-531 & n.19; *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 360 n.1 (2001) (declining to address the constitutionality of Congress's enactment of Title II due to the unresolved question of whether the plaintiffs had stated a claim under Title II).

Because the court of appeals' decision has held an Act of Congress to be unconstitutional and, in so doing, has failed to apply this Court's recent and controlling precedent, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated,

and the case remanded for further consideration in light of *United States* v. *Georgia*, *supra*. See *United States* v. *Nebraska Dep't of Health & Human Servs. Finance & Support*, 126 S. Ct. 1826 (2006) (vacating and remanding for further consideration of decision holding Title II's abrogation to be unconstitutional in light of *Georgia*).

2. The court of appeals' decision should also be vacated and remanded because it failed to give effect to this Court's decision in *Tennessee* v. *Lane*, *supra*. In holding Title II's abrogation to be unconstitutional, the court of appeals relied entirely on pre-*Lane* circuit precedent, *Popovich* v. *Cuyahoga Court of Common Pleas*, 276 F.3d 808 (en banc), cert. denied, 537 U.S. 812 (2002), which had ruled that Title II's abrogation is valid only insofar as it applies to claims sounding in due process, and not to claims based on the Equal Protection Clause of the Fourteenth Amendment. See Pet. App. 11a (citing *Popovich*, 276 F.3d at 812). Although the court of appeals acknowledged this Court's decision in *Lane*, Pet. App. 10a, the court held that *Lane* is limited to access-to-the-court cases and "does not provide us with guidance for this case" simply because it arose in a somewhat different factual context, *ibid.*

That holding is irreconcilable with *Lane*. First, *Lane* itself arose out of the Sixth Circuit's application of *Popovich*, and this Court pointedly did not adopt that decision's categorical distinction between Title II claims rooted in due process principles and those enforcing equal protection. 541 U.S. at 515, 522-534. Moreover, this Court eschewed the *Popovich* model notwithstanding that one of the plaintiffs before the Court, Beverly Jones, raised claims that implicated only the Equal Protection Clause. *Id.* at 514 ("Jones, a certified court re-

porter, alleged that she has not been able to gain access to a number of county courthouses, and, as a result, has lost both work and an opportunity to participate in the judicial process.").

Second, the Sixth Circuit's decision in *Popovich* failed to consider whether there was a history of unconstitutional discrimination in the provision of governmental services that warranted an exercise of Congress's prophylactic powers under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. This Court held in *Lane*, however, that Congress passed Title II in response to an "extensive record of disability discrimination," 541 U.S. at 529, and "of pervasive unequal treatment [of individuals with disabilities] in the administration of state services and programs, including systematic deprivations of fundamental rights," *id.* at 524. See *id.* at 528 (noting the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services"). The Court accordingly held in *Lane* that it was "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id.* at 529. Of particular relevance here, *Lane* found that the record of "unconstitutional treatment of disabled persons by state agencies" included administration of "the penal system," *id.* at 524-525, and other forms of "institutionalization," *id.* at 529 (quoting 42 U.S.C. 12101(a)(3)).

Third, this Court clarified in *Lane* that the relevant focus for examining the constitutionality of the prophylactic reach of Title II's abrogation is not the particular type of claim raised by an individual plaintiff, but rather the substantive category of governmental activities and

the cluster of constitutional rights they may implicate. See *Lane*, 541 U.S. at 531 (discussing the full range of constitutional rights involved in the administration and accessibility of judicial services, not just the particular claims raised by the two plaintiffs); *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 725 (2003) (upholding the family-leave provisions of the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.*, as a proper exercise of Congress's Section 5 power to combat historic gender discrimination even though the complaint contained no constitutional claim of gender discrimination); see also *Hibbs*, *supra*, J.A. 6-18 (No. 01-1368). This is likely to be even more true after *Georgia*, because the validity of the prophylactic reach of the statute will generally be addressed only after determining that the claim involves a statutory, not constitutional, claim. The operative question thus is not, as the court of appeals held (Pet. App. 11a), whether these particular petitioners raised an equal protection claim rather than a due process claim, but whether Title II is proper Section 5 legislation as applied to the entire "class of cases implicating the accessibility of" correctional programs. *Lane*, 541 U.S. at 531. The Court's recent decision in *Georgia* underscored that the lens through which courts should analyze the constitutionality of Title II's abrogation is the "class of [governmental] conduct" at issue. 126 S. Ct. at 882.

Contrary to the court of appeals' conclusion (Pet. App. 10a) that *Lane* "does not provide [courts] with guidance" outside of access-to-the-court cases, this Court's holdings in *Lane* and *Georgia* concerning both the foundation for congressional legislation and the proper mode of analyzing the constitutionality of Title II's abrogation are just as binding on the Sixth Circuit

as the bottom-line judgment in *Lane*. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [this Court]"—and, *a fortiori*, the lower courts —"are bound." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 67 (1996). Indeed, the court of appeals' holding that *Lane* has no relevance outside of court-access cases conflicts with the Fourth Circuit's decision in *Constantine* v. *Rectors & Visitors of George Mason University*, 411 F.3d 474 (2005). In *Constantine*, which involved Title II's application to public education, the Fourth Circuit held that *Lane*'s analysis precluded adherence to prior circuit precedent holding Title II's abrogation unconstitutional in its entirety. *Id.* at 486 n.8 (*Lane* renders the reasoning that underlay prior circuit precedent "obsolete").

The court of appeals' misapplication of *Lane* provides an additional basis to vacate the judgment below and remand for further consideration in light of this Court's decisions in *Lane* and *Georgia*. See *Klingler* v. *Director, Dep't of Revenue*, 125 S. Ct. 2899 (2005) (vacating and remanding for, *inter alia*, reconsideration in light of *Lane*, despite the court of appeals' consideration and denial of a rehearing petition based on *Lane*).

CONCLUSION

The petition for a writ of certiorari should be granted, the court of appeals' decision vacated, and the case remanded for further consideration in light of *United States* v. *Georgia*, 126 S. Ct. 877 (2006), and *Tennessee* v. *Lane*, 541 U.S. 509 (2004).

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

WAN J. KIM
Assistant Attorney General

JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
Attorneys

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